

TAX APPEAL BOARD OF THE STATE OF DELAWARE

VISIONS UNLIMITED, INC.)	
)	
Petitioners,)	
)	
v.)	Docket Nos. 1444, 1450 & 1456
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

BEFORE: Todd C. Schiltz, Esq., Chairman, Steven R. Director, Esq., Vice Chairman,
 and Regina Dudzic, Cynthia L. Hughes and Joan M. Winters, CPA, Members.

 Chris D. Galligan, CPA, for Petitioner.

 John S. McDaniel, Esq., Deputy Attorney General for Respondent.

DECISION AND ORDER

In these consolidated matters, petitioner Visions Unlimited, Inc. (“Visions”) contends that respondent Director of Revenue (“Director”) improperly assessed tax, interest and penalties against Visions, a subchapter S corporation, for its failure to report and pay taxes on behalf of its nonresident individual shareholder. For the reasons set forth below, the Board concludes that the Director properly assessed tax, penalty and interest against Visions for its failure to comply with 30 *Del. C.* § 1158(a).

FACTS

Visions is a New Jersey corporation which has elected to be treated as a subchapter S corporation for federal income tax purposes for each of its 2004, 2005 and 2006 taxable years. Stipulation of Facts (“SOF”) ¶¶ 1, 5. Visions has a single shareholder, Stephen R. Simpson. SOF ¶ 3. Mr. Simpson is domiciled in Pennsylvania, and therefore a nonresident individual for purposes of 30 *Del. C.* §§ 101 et seq. of the Delaware Code (hereinafter referred to as “the

Delaware Tax Code”). SOF ¶ 3; 30 *Del. C.* §§ 1103, 1104. Visions is engaged in the business of inspecting fruits and vegetables and during tax years 2004, 2005 and 2006 engaged in this activity both within and without Delaware. SOF ¶ 4.

In accordance with 30 *Del. C.* § 1605, Visions filed its annual information return with Delaware for tax years 2004, 2005 and 2006 on Form 1100S which is titled “S Corporation and Shareholder Reconciliation Return.” SOF ¶ 5, Exs. A, B and C. The Form 1100S required Visions to identify its “Total Net Income from Delaware,” the “Percentage of stock owned by non-residents,” the “Distributive income attributable to non-resident shareholders,” and the “Tax due on behalf of non-resident shareholders.” SOF Exs. A, B and C. Each of Visions’ returns indicated that it had earned net income from operations in Delaware; however, two of the returns incorrectly reported that “0” percent of Visions’ stock was held by a nonresident individual and all of the returns stated that “0” tax was due to Delaware on behalf of the nonresident individual shareholder. *Id.* Visions has stipulated that it “did not make any payments of tax . . . on behalf of Simpson . . . for any of the years 2004, 2005 or 2006.” SOF ¶ 7.

During the years in question, Mr. Simpson and his wife filed Individual Non-Resident Income Tax Returns with the State of Delaware on Form 200-02. SOF Exs. D, E and F. The Simpsons paid the amount those returns indicated was due to Delaware, either by estimated tax payments (for tax years 2004 and 2006) or with their year-end return (for 2005). SOF ¶ 8.

With respect to each year, the Director sent Visions a proposed assessment of tax, interest and penalties pursuant to 30 *Del. C.* § 521. SOF ¶¶ 10a, 10b, 11a, 11m, 12a, Exs. J, K, L, N and O. The assessments asserted that Visions owed tax pursuant to 30 *Del. C.* § 1158, interest pursuant to 30 *Del. C.* § 533 and penalty pursuant to 30 *Del. C.* §§ 534(b)(2) and 535. *Id.* The

following charts summarize the tax, interest and penalties the Director contends Visions owes as of the date of the assessments and identify the statutory sections upon which the Director relies.

2004

	Amount Sought	Statute
Tax	\$193.00	1158(a)
Interest	\$48.25	533(a)
Penalty	\$20.37	534(b)(2)

2005

	Amount Sought	Statute
Tax	\$520.00	1158(a)
Interest	\$119.60	533(a)

2006

	Amount Sought	Statute
Tax	\$371.00	1158(a)
Penalty	\$41.84	535(c)

Visions protested each of the assessments and the Director issued Notices of Determination denying the protests. SOF ¶¶ 10, 11 and 12. Visions then appealed the Director's determinations to this Board. *Id.*

QUESTIONS PRESENTED

Based on the briefing of the parties, the questions presented are:

1. Is the Director's Notice of Assessment issued pursuant to 30 *Del. C.* § 521 deficient because Visions is not a "taxpayer" as that term is used in Section 521?
2. Is Visions required to pay estimated taxes on behalf of its nonresident shareholder pursuant to Section 1158(a)?
3. Is Visions required to pay the tax, interest and penalties sought by the Director?
4. Does the Director's effort to enforce Section 1158 against Visions violate Visions' constitutional rights under Article IV, § 2 of the Constitution of the United States and Article VIII, § 1 of the Constitution of the State of Delaware?

ANALYSIS

A. Section 1158

In pertinent part, Section 1158 of the Delaware Tax Code provides as follows:

(a) *Every corporation that is an S corporation for federal income tax purposes for any taxable year . . . in which it has any shareholder who is a nonresident individual, shall pay, at the times and in the percentages set forth in § 1905 of this title, on behalf of each such nonresident, tax in an amount equal to the highest rate of tax set forth in § 1102(a) of this title multiplied by the nonresident's distributive share of the income of such corporation determined in accordance with § 1124 of this title.*

(b) Any payment of tax under subsection (a) of this section by a corporation shall be considered to have been distributed or advanced by such corporation to the nonresident individual on whose behalf such tax was paid on the date such payment was made by such corporation. Such nonresident shall be credited for purposes of §§ 1169 and 1170 of this title with having made a declaration and payment of estimated tax on the date such payment under subsection (a) of this section was made such corporation

(c) *If an S corporation fails to pay any tax required to be paid by such corporation under subsection (a) of this section, such corporation shall be liable for any penalties, interest and additions to tax applicable to such failure in the same manner as if such were required to be paid by the corporation on its own behalf. . . .*

30 *Del. C.* § 1158 (emphasis added).

In sum, Section 1158 requires S corporations with nonresident individual shareholders to remit a tax on behalf of such shareholders in an amount equal to (i) each nonresident individual shareholder's distributive share of the corporation's Delaware sourced income multiplied by (ii) the highest rate of Delaware personal income tax. The statute requires installment payments to be made at the time and in the percentages required by 30 *Del. C.* § 1905.¹ Section 1158(b)

¹ Section 1905 requires calendar year corporations to pay 50% of its current year estimated tax liability on April 1, 20% of its current estimated tax liability on June 1 and September 1 and 10% of its current estimated tax liability on December 15, with any additional actual tax owed to be paid with the corporation's final return filed on April 1 of the year following the end of the taxable year. 30 *Del. C.* § 1905(1) and (3). As an S corporation, Visions is exempt from corporate income tax and does not pay estimated or final taxes on

states that the corporation's payments on behalf of the nonresident individual shareholder are credited toward the obligation of the nonresident individual shareholder to declare and pay estimated personal income tax pursuant to 30 *Del. C.* §§ 1169 and 1170. Section 1158(c) addresses consequences that arise as a result of the S corporation's failure to comply with subsection 1158(a).

Visions did not comply with Section 1158(a) in 2004, 2005 or 2006 and contends that, as an S corporation, it is exempt from complying with the statute. The Director disagrees and seeks to recover the tax Visions did not pay on behalf of Mr. Simpson as well as the interest and penalties that arise as a result of Visions' failure to pay taxes on behalf of Mr. Simpson.

B. Visions Is A "Taxpayer"

Before turning to the substance of the dispute, a threshold issue is whether Visions is a "taxpayer" as that term is used in 30 *Del. C.* § 521. Section 521(a) provides that "[a]s soon as practicable after any return is filed, the Director shall examine it to determine the correct amount of tax. If . . . the amount of tax shown is less than the correct amount, the Director shall notify the taxpayer in writing of the deficiency proposed to be assessed." Section 521(c) further provides that the written notice "shall be mailed . . . to the taxpayer at the taxpayer's last known address." The parties have stipulated that, after reviewing Visions' 2004, 2005 and 2006 annual

its own behalf on the schedule established by Section 1905. 30 *Del. C.* § 1902(b)(9). Nevertheless, Section 1158 requires Visions, a calendar year corporation, to pay tax on behalf of its nonresident shareholders on the schedule and in the percentages set by Section 1905.

information returns, the Director sent notices of assessment to Visions at its mailing address and principal place of business. SOF ¶¶ 2, 10a, 10b, 11a, 11m, 12a, Exs. J, K, L, N and O.

Visions does not dispute that it received the notice. Rather, because it is an S corporation and exempt from paying tax on its income in Delaware, *see* 30 *Del. C.* §§ 1621(a) and 1902(b)(9), Visions contends that it is not a “taxpayer” and that, therefore, the Director may not send it a notice of assessment under Section 521.

Visions’ is incorrect. The mere fact that S corporations are not required to pay certain types of tax does not mean that they are not or can not be taxpayers. For example, an S corporation may have employees in Delaware who are subject to wage and withholding tax. Such S corporations are certainly taxpayers notwithstanding the fact that they do not pay corporate income taxes. Visions has employees working in Delaware. SOF ¶ 6.

More significantly, Section 1158(a) expressly requires S corporations with nonresident individual shareholders, like Visions, to pay a tax on behalf of such shareholders: “*Every corporation that is an S corporation for federal income tax purposes for any taxable year . . . in which it has any shareholder who is a nonresident individual, shall pay, at the times and in the percentages set forth in § 1905 of this title, on behalf of each such nonresident, tax . . .*” 30 *Del. C.* § 1158(a) (emphasis added). Although Section 1158(a) requires Visions to pay a tax on behalf of its nonresident individual shareholders, it still requires Visions to pay a tax. As Visions is required to pay a tax, it is a taxpayer as that term is used in Section 521 and the Director can send Visions a notice of assessment under that statute.

C. Visions Must Comply With Section 1158(a)

After considering the arguments advanced by the parties, the Board concludes that the language of Section 1158 is unambiguous and requires Visions to pay taxes on behalf of its nonresident individual shareholders as detailed above. Visions asserts that Section 1158 is ambiguous because it contains terms which are not defined by Delaware statute or case law. Visions points to the word “applicable” and the phrase “as if such tax were required to be paid by the corporation on its own behalf” as examples of undefined, ambiguous terms in the statute.

The fact that terms are not defined does not make the statute ambiguous. *See McGuinness v. Board of Adjustment of Town of Henlopen Acres*, 2006 WL 1064177 (Del. Super.) (rejecting argument that zoning code is ambiguous because term is not defined). Ambiguity arises when a statute is reasonably susceptible to different conclusions or interpretations. *Newtowne Village Service Corp. v. Newtowne Road Development Co., Inc.*, 772 A.2d 172 (Del. 2001). Here, the language is plain, conveys a clear and definite meaning, and is not reasonably susceptible to different interpretations. Because the statute is unambiguous, there is no need for interpretation and the plain meaning of the statutory language controls. *Ingram v. Thorpe*, 747 A.2d 545 (Del. 2000).

The plain language of the Section 1158 requires Visions to pay taxes on behalf of Mr. Simpson on the schedule established by Section 1905. Visions did not make such payments in 2004, 2005 or 2006, and therefore is in violation of Section 1158.²

² The fact the Mr. and Mrs. Simpson paid the nonresident taxes they owed to Delaware does not relieve Visions of its obligation to comply with Section 1158. The statute imposes a distinct obligation on S corporations - to pay tax on behalf of its nonresident individual shareholders - and the failure to comply with this obligation cannot be cured by the actions of the nonresident shareholder. Indeed, if the General Assembly had intended such a result, it easily could have included language to this effect in Section 1158. It did not, and in fact made S corporations individually liable for any failure to comply with Section 1158. *See 30 Del. C. § 1158(c)*. The absence of a carve-out in

In addition to arguing that Section 1158 is ambiguous, Visions contends that enforcement of Section 1158 is inconsistent with the entire scheme of the Delaware Tax Code as it applies to S corporations. In essence, Visions makes a series of arguments premised on the view that because it is an S corporation and exempt from paying personal or corporate income tax on its own behalf, it cannot be required to pay taxes on behalf of its nonresident individual shareholders. None of Visions' arguments bear scrutiny.

1. Section 1158 Is Not Inconsistent With Section 1621

One statutory provision Visions points to as being inconsistent with Section 1158 is 30 *Del. C.* § 1621(a). Section 1621(a) provides that "A pass-through entity as such shall not be subject to income tax imposed by Chapter 11 or Chapter 19 of this title."

Although S corporations are pass-through entities, 30 *Del. C.* § 1601(b)(6)b, the Board concludes that Section 1621(a) does not prohibit enforcement of Section 1158. By its clear terms, Section 1621(a) provides that S corporations "as such shall not be subject to . . . income

Section 1158 for situations where a nonresident individual shareholder pays the taxes coupled with the language in Section 1158(c), which makes clear S corporations are responsible for failing to comply with Section 1158(a), demonstrates that the General Assembly did not intend for S corporations to be relieved of their obligations by the actions of their nonresident individual shareholders.

Moreover, Mr. and Mrs. Simpson have filed amended individual returns for 2004, 2005 and 2006 seeking refunds of income taxes they paid as nonresident owners of an S corporation with income derived in Delaware. SOF ¶ 9, Exs. G, H and I. The request for a refund is premised on the assumption that Visions has paid taxes on their behalf under Section 1158. SOF Ex. G at line 14, Ex. H at line 14 and Ex. I at line 14.

tax” Section 1158 requires an S corporation to remit payment of tax on behalf of its nonresident individual shareholders, not on behalf of the S corporation itself, and thereby merely serves as a mechanism for collecting taxes due from nonresident individual shareholders. *See* 30 *Del. C.* §§ 1161, 1169 and 1170 (requiring the filing of estimated and final tax returns by nonresident individuals who have income from sources in Delaware); *see also* SOF Ex. P (Section 1158 provides the State with an easier means of collecting tax due from nonresident individual shareholders of S corporations). Hence, the “tax” that Section 1158 requires S corporations to remit is not a tax on the income of the S corporation “as such.” Rather, the tax is on that portion of the S corporation’s Delaware sourced income that is attributable to the nonresident individual shareholder. As a result, Section 1158 does not subject S corporations “as such” to “income tax imposed by Chapter 11 or Chapter 19 of this title.”³

2. Section 1158 Is Not Inconsistent With Sections 1902, 1904 or 1905

Section 1902(b)(9) of the Delaware Tax Code recognizes that S corporations are exempt from paying corporate income tax in Delaware. 30 *Del. C.* § 1902(b)(9). Section 1904(e) requires nonexempt foreign and domestic corporations to file certain income tax returns with the

³ Adopting Visions’ reading of Sections 1158 and 1621(a) would result in Section 1158 being unenforceable as to S corporations and, thus, mere surplusage. Such a result is inconsistent with the terms of Section 1158, which expressly state the statute was intended to apply to “[e]very corporation that is an S corporation,” and basic rules of statutory construction. *Arbern-Wilmington, Inc. v. Director of Revenue*, 596 A.2d 1385 (Del. 1991) (a statute cannot be construed in such a way that part of it becomes surplusage if there is another reasonable construction available). In contrast, the Director’s reading of Section 1158 and 1621(a) comports with statutory construction maxims. *E.I. Du Pont de Nemours & Co. v. Clark*, 88 A.2d 436 (Del. 1952) (General Assembly presumed not to intend an unreasonable, absurd or unworkable result when enacting a statute); *State Dept. of Labor, Div. of Unemployment Ins. v. Reynolds*, 669 A.2d 90 (Del. 1995) (when there are potentially conflicting sections of a statute, sections must be read together and harmonized if possible).

State, including estimated and final returns. 30 *Del. C.* § 1904(e).⁴ Section 1905(3) requires corporations to pay any income tax due in excess of their estimated tax payments with the year-end return they file with the State. 30 *Del. C.* § 1905(3).

Visions contends that “the combination of these three code sections prohibits the Director of Revenue from requiring that taxes be remitted with the annual information return . . . of Visions.” (Visions Opening Brief at 17-18). Specifically, Visions contends that it cannot be required to remit payments in accordance with Section 1158 because S corporations have no obligation to pay taxes or file estimated or final returns - such entities are only required to file an annual information return - and because the date its annual information return is due is not the same as the dates the estimated payments are due under Section 1158.

With respect to Section 1902(b)(9), Visions’ argument is no different than its argument with respect to Section 1621(a). As demonstrated above, the mere fact Visions is an S corporation and not required to pay corporate income taxes does not relieve it of the separate and independent obligation to pay taxes on behalf of its nonresident individual shareholders as mandated by Section 1158. Similarly, the fact S corporations are not required to file tentative and final returns under Section 1904 and the fact that the date S corporations must file their annual information return is different from the date estimated tax payments are due under Section 1905 does not relieve an S corporation from its separate and distinct obligation to comply with Section 1158. The fact that Section 1158 creates additional obligations does not

⁴ While exempt entities like S corporations are not required to file estimated and final returns in compliance with Section 1904(e), S corporations are required to file year-end annual information returns on Form 1100S. 30 *Del. C.* § 1605. Consistent with the last sentence of Section 1605(a), the Form 1100S requires S corporations to identify the tax liability of nonresident individual shareholders based on the S corporation’s Delaware sourced income.

mean that it is inconsistent or unenforceable. *See Ingram v. Thorpe*, 747 A.2d 545 (Del. 2000) (statutes must be construed as a whole and in a manner that avoids absurd results).

3. The Delaware Tax Code Requires Visions To Pay Personal Income Tax On Behalf Of Its Nonresident Individual Shareholders

Visions also argues that the tax at issue is personal income tax, based on the placement of Section 1158 in Chapter 11 of the Delaware Tax Code and because Chapter 11 is titled “Personal Income Tax,” and that this fact somehow precludes the Director from seeking to enforce Section 1158. This argument ignores the clear language of Section 1158, which imposes an obligation on S corporations like Visions to pay the personal income tax of its nonresident individual shareholders that is due on the corporation’s Delaware sourced income. The fact Visions is not a person or otherwise subject to Chapter 11 of the Delaware Tax Code does not relieve Visions of its obligation to comply with Section 1158. *See 1 Del. C. § 305* (“The classification and organization of the titles, parts, chapters, subchapters and sections of [the Delaware] Code . . . are made for purposes of convenient reference and orderly arrangement, and no implication, inference or presumption of a legislative construction shall be drawn therefrom”).⁵

⁵ Visions also contends that Section 1158 is unenforceable because it would result in two taxpayers - the S corporation and the nonresident individual shareholder - paying the taxes owed and this double recovery would be a windfall to the State. While nonresident individuals do have an independent obligation to pay individual estimated and final taxes, subsection 1158(b) gives the nonresident a credit for all taxes paid on his/her behalf by the S corporation. Hence, the State will not be paid twice or receive a windfall. Indeed, the Simpsons have taken the steps necessary to avoid that very result by filing amended personal returns for 2004, 2005 and 2006 which seek a tax refund based on the taxes Visions is required to pay on Mr. Simpson’s behalf under Section 1158. SOF Exs. G, H and I.

D. Visions Must Pay the Tax, Interest and Penalties Sought by the Director

As Visions did not comply with Section 1158, the Director assessed Visions with the taxes, interest and penalties set forth above. Visions challenges each of these assessments.

With respect to taxes, Visions contends that: (i) Section 1158(c) identifies the remedies available for its failure to comply with Section 1158(a); (ii) 1158(c) states that an S corporation failing to comply with Section 1158(a) “shall be liable for any penalties, interest and additions to tax”; (iii) the taxes Visions was required to pay under 1158(a) are not “penalties, interest or additions to tax”; and (iv) thus, the Director cannot require Visions to pay the tax due under Section 1158(a). We disagree.

Section 1158(a) requires Visions to pay taxes on behalf of Mr. Simpson. Form 1100S requires Visions to identify the taxes it must pay on behalf of its nonresident individual shareholders. If Visions fails to identify or pay taxes on Mr. Simpson’s behalf, the Director is empowered to determine the correct amount of tax Visions owes and to seek payment from Visions for any unpaid amount. *See 30 Del. C. § 521.* The fact Section 1158(c) does not repeat the word “tax” does not impair the Director’s ability to act under other provisions of the Delaware Tax Code.

With respect to interest, the Director sought interest payments from Visions for the 2004 and 2005 tax years pursuant to 30 *Del. C. § 533(a)*. In pertinent part, Section 533(a) provides as follows:

If any amount of tax . . . imposed by this title . . . is not paid on or before the last date prescribed for payment, interest on such amount at the rate of 0.5% per month, or fraction thereof, shall be payable for the period from such last date to the date such amount is paid . . . No interest shall be imposed . . . [for] failure to pay estimated income tax under § 1170 or § 1904 of this title.⁶

⁶ Prior to July 10, 2006, the interest rate charged under Section 533(a) was 1% per month.

Visions argues that the Director can not recover interest under Section 533(a) because the Director is charging interest on Visions' failure to pay estimated tax payments. This is simply incorrect. The Director is imposing interest as a result of Visions' failure to pay the final tax on behalf of Mr. Simpson. See SOF Ex. J ($\$193$ (tax due) \times 1% (percentage of amount due each month for failure to pay a final tax) \times 25 months (number of months between date tax was due and date of assessment)); Ex. N ($\$520$ (tax due) \times 1% (percentage of amount due each month for failure to pay a final tax) \times 23 months (number of months between date tax was due and date of assessment)). Specifically, in 2004 and 2005, Visions submitted annual information returns which indicated that no tax was due on behalf of its nonresident individual shareholders and it paid no tax on behalf of such shareholders when it filed its returns. It is this failure, not the failure of Visions to pay estimated taxes on behalf of Mr. Simpson throughout the year as also is required by Section 1158(a), that has triggered the Director's request for interest. Accordingly, the Director is entitled to recover the interest payments he seeks under Section 533(a).

As to penalties, the Director seeks to impose a penalty pursuant to 30 *Del. C.* § 534(b)(2) for the 2004 tax year and a penalty pursuant to 30 *Del. C.* § 535(c) for the 2006 tax year. Visions argues that neither is applicable.

Section 534(b)(2) provides that if a taxpayer fails to pay a tax "required to be shown on a return . . . which is not so shown," then "there shall be added to the amount of tax stated in the notice of proposed assessment 0.5% of the amount of such tax if the failure is for not more than a month, with an additional 0.5% for each additional month or fraction thereof during which such failure continues, not exceeding 25% in the aggregate." However, Section 534(e) states that Section 534 "shall not apply to any failure to file a declaration of estimated tax or to pay any estimated tax." Visions contends that the Director is seeking to impose a penalty for its failure to

declare and pay estimated taxes on behalf of a nonresident and that this is precluded by Section 534(e). Visions is again incorrect. The Director seeks to impose a penalty based on Visions' failure to declare and pay tax in connection with the filing of Visions' 2004 annual information return. See above. Taxes due in connection with the annual information return are not estimated taxes and, therefore, Section 534(e) does not bar the Director from collecting the assessed penalty.

Section 535(c) provides that "[i]n the case of any underpayment of tentative tax or installment of estimated tax required by Chapter 19 of this title, there shall be added to the tax for the taxable year an amount equal to 1½% per month, or fraction thereof, of the amount of such underpayment for the period of the underpayment." Visions argues that penalty under Section 535(c) is inappropriate because the underpayment at issue is not an estimated tax required by Chapter 19 of the Delaware Tax Code.

Visions is wrong for two reasons. First, Section 535(c) allows for a penalty when there has been either (i) an underpayment of tentative tax, or (ii) an underpayment of estimated tax required by Chapter 19 of the Delaware Tax Code. The underpayments here, the failure to pay taxes on behalf of a nonresident individual shareholder, are an underpayment of tentative tax and, therefore, Section 535(c) is applicable. SOF Ex. O (imposing penalty "For Failure To Pay Tentative Tax").

Second, the taxes at issue are an underpayment of estimated tax required by Chapter 19 of the Delaware Tax Code. Chapter 19 contains the provisions related to the taxation of corporations in Delaware. Section 1905, the provision expressly referred to in Section 1158(a) as setting the timing and percentages of the estimated taxes Visions must pay on behalf of Mr. Simpson, is part of Chapter 19. As Section 1905 establishes when Visions must pay estimated

taxes on behalf of Mr. Simpson and the percentages that must be paid and as Section 1905 is part of Chapter 19, the estimated taxes a subchapter S corporation must pay on behalf of nonresident individual shareholders under Section 1158 are “estimated taxes required by Chapter 19 of this title.” 30 *Del. C.* § 535(c)(1). This conclusion is consistent with the language in Section 1158(c) which recognizes that a subchapter S corporation's failure to pay any taxes due under Section 1158(a) gives rise to a corporate liability “applicable to such failure in the same manner as if such tax were required to be paid by the corporation on its own behalf.” 30 *Del. C.* § 1158(c).

Accordingly, the Director is entitled to recover the penalty he seeks under Section 535(c).

E. The Board Does Not Have the Authority to Rule on Visions' Constitutional Issues

The final argument Visions raises is that the Director's enforcement of Section 1158 violates Article IV, § 2 of the Constitution of the United States and Article VIII, § 1 of the Constitution of the State of Delaware. For more than thirty years, this Board has said that it does not have the authority to determine whether or not a statute is constitutional. As explained in *American Paving Co. v. Director of Revenue*, RIA SLT DE 553 (10/13/1976):

[Petitioner's] argument raises the issue as to whether or not a quasi judicial body such as the Tax Appeal Board has the authority to rule on the constitutionality of a statute. It is well-settled that the jurisdiction to pass on the constitutionality of an act of the legislature is inherent in the courts. 16 C.J.S., *Constitutional Law* § 92. In Delaware, it has been held that if an act of the legislature is repugnant to the Constitution, the courts have the power and it is their duty, so to declare it. *Bailey v. Philadelphia W. & B.R. Co.*, 4 Har. 389, 44 Am. Dec. 593 (emphasis added). Since the courts not only have the power but the duty to rule on the constitutionality of the statutes, then it goes without saying that the Tax Appeal Board is without authority to make such a determination. See *U.S. v. Butler, Mass.*, 56 S. Ct. 312, 297 U.S. 1, 80 L.Ed. 477, 102 ALR 914; *Central Ohio Coop Milk Producers v. Glander, B.T.A.*, 92 NE2d 834; *S.S. Kresge Co. v. Bowers*, 166 NE2d 139, 170 Ohio St. 405, app. dism., 81 S. Ct. 712, 365 U.S. 466, 5 L.Ed.2nd 704; *State ex rel Park Inc. Co. v. Board of Tax Appeals*, 289 NE2d 579, 32 Ohio St. 2d 28. Therefore, since the Tax Appeal Board has no authority to declare the provisions of 30 *Del. C.* § 2502 unconstitutional, said statute is deemed to be valid for it is clothed by a

presumption of constitutionality. *Downs v. Jacobs*, 272 A.2d 706; *Kreisher v. State*, 303 A.2d 651.

This Board likewise has held that it does not have the authority to determine if the Director is applying a statute in a constitutional manner. See *Rombach v. Director of Revenue*, RIA SLT DE 1003 (03/10/1995) (refusing to consider petitioners' argument that the Director's interpretation of 30 *Del. C.* § 1147 violated their right under the United States and Delaware constitutions).

As the Board does not have the authority to address constitutional issues, it will deny Visions' petition to the extent it asks the Board to rule on the constitutionality of Section 1158 or the Director's enforcement thereof.

CONCLUSION

For the reasons stated, we hold that the tax, penalties and interest the Director assessed against Visions must be upheld in all respects. The Director is instructed to circulate a proposed form of order to Visions for review. The proposed form of order shall detail the total tax, penalty and interest that Visions currently owes the State. Tax Appeal Board Rules 19(e) and 20. The parties shall file a joint proposed order for signature by the Board, or, if necessary, separate proposed forms of order, within thirty (30) days of the date of this opinion. Tax Appeal Board Rule 20.

Paul C. Silf

Regina C. Dodge

Cynthia L. Hughes

Jean M. Went

Date: April 8, 2009